

Zimbabwe Law Review



Volume 9 - 10

1991 - 1992

THE ZIMBABWE LAW REVIEW

1991- 1992 VOLUMES 9 &10

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The Zimbabwe Law Review is no longer a thing of the past!

You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review" !

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.

In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.

THE PHILOSOPHY OF PUBLIC REASON

by

Dennis T Mandudzo*

So too, academic freedom is what it is. It is not general liberty, pleasant working conditions, equality, self realisation, or happiness.¹

Introduction

To contemporary African politics, academic freedom is at best irrelevant and, at worst, conjures up images of political opposition. This explains the fate of many African universities and academics. Current Western jurisprudence has done no better. Academic freedom is consistently ascribed to certain political systems or cultures. Under this utilitarian calculus, academic freedom can be regulated according to the interests of politics or the market. This is the point of departure in this article. It suggests that the current understanding of academic freedom, which finds academic freedom a servant of politics and economics (both from the rightist and leftist perspective) is nothing but the variegation of error. If this is true, how therefore can we understand academic freedom, and what underlies its philosophical foundation? The alternative framework I advance suggests the proper understanding of academic freedom lies in its grasp as an idea of public reason, so to speak. This indeed, is **the** theory of academic freedom.

The argument is at three levels. First, while the practice of academic freedom can be examined from a historical or sociological perspective, the concept of academic freedom is ahistorical; it is a universal idea inherent in human reason. The political instantiation of academic freedom only affects the way the right is practised. As an idea of reason, academic freedom finds practical vindication in the university, an institution which presents itself as the exemplar of public reason. Secondly, the liberal conception of academic freedom comes closest to realisation of the concept. Thirdly, utilitarian considerations cannot provide a normative foundation for academic freedom, even though they buttress the metaphysical underpinnings of academic freedom.

The formal nature of the discussion makes it easier to judge whether academic freedom exists and if it does, whether it is worthy of legal sanction as a right. I begin by explaining the theoretical underpinnings that underlie the liberal conception of academic freedom rather than with a definition of the idea itself. A substantive definition of academic freedom at this stage would require us to impose theory on reality. Truth is a complex matter and to define it now would unduly limit the inquiry.

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¹ Mark G Yudof, "Intramural Musings on Academic Freedom: A Reply to Professor Finkin," (1988) 66 *Texas Law Review* 1351, at p 1357.

A definition *per se* does not solve fundamental issues, as its merit depends upon the theory in which it is embedded. "Analyses of meaning therefore have no privileged status but must be assessed as elements of a larger theoretical enterprise."²

The liberal conception of academic freedom has taken from politics the fundamental values of free speech, free press and the right to hold an opinion. From commerce, it has borrowed the analogy of a free market of ideas. From science and philosophy it has taken the notion of an ongoing search for truth, fostered by free inquiry and authenticated by objective processes and judged by the proficient.

Freedom of Expression and Opinion

There are four justifications that are commonly said to underlie freedom of expression. These values also find particular application to academic freedom.

- A. Freedom of expression serves truth by creating a marketplace of ideas. This idea has found judicial expression in Justice Holmes's famous dissent in *Abrams v United States*³. Holmes J opined that "the best test for truth is the power of thought to get itself accepted in the competition of the market."
- B. Freedom of expression protects democracy. This view is championed by Alexander Meiklejohn, especially in his book *Political Freedom: The Constitutional Power of the People*, (1960) where he argues that the critical issue for free speech is not that everyone should speak but rather that everything worth saying shall be said.⁴
- C. Freedom of expression maintains social stability. This view is articulated by Thomas Emerson, in *The System Of Freedom Of Expression*, p7 (1970). Emerson argues that free expression ensures social coherence because people are likely to accept adverse decisions if they were part of the decision making process. If people are not free to express themselves they are likely to go underground.
- D. Freedom of expression promotes self fulfilment, which encourages self government/autonomy and identity. This is the opposite of a politically imposed orthodox way of life. Governments should not dictate ideas; people should be to left decide for themselves what they want to know within the confines of reason. The political justification is that provided by Mill, i.e. that it protects individualism which serves both the individual and the common good.⁵

² John Rawls, *A Theory of Justice*, p 130 (1971). See also Kenneth I Winston, "The Ideal Element in the Definition of Law," (1985) 5 *Law and Philosophy* 89, "Rather the definition serves as a proxy for the deeper issues at stake ... a good definition is one that organises the subject matter in such a way that help us grasp more clearly the fundamental patterns in our fields of study."

³ 250 U.S. 616, at p 630 (1919).

⁴ The same can be said with academic freedom; the idea is not that everything is studied, but that everything meriting study is studied.

⁵ John Stuart Mill, *On Liberty*, (Gertrude Himmelfarb, ed, 1974). I discuss Mill's idea below.

From the above justifications we crystallise the following principle: Expression which serves all the above principles has priority over expression which serves few or none of the above principles. A central argument in this paper is that academic freedom which satisfies all the above principles in fact transcends them. The free expression principle indicates that academic freedom can manifest itself as the paradigm of free speech. The case for academic freedom, of all the manifestations of free speech, is the strongest. The further one moves away from the principle of academic freedom the nearer one gets to principles that are alien to free speech.

The Marketplace of Ideas

The discussion here centres on the marketplace of ideas in so far as it relates to the idea of academic freedom. The market for truth consists of "trade" i.e. competition in ideas on philosophy, politics, humanities, social sciences, natural and physical sciences, art; in short all branches of human knowledge.⁶ The idea of the free market of ideas has its fair share of critics. It has been argued that it is based on *laissez faire* economic theory. But *laissez faire* economic theory is contradicted by the modern market which is heavily regulated by the state. Moreover the real market favours the elites and is sometimes riddled with monopolies.⁷ Smolla, argues that if truth is the aim of the academic market, then such a market is contradicted by our everyday experiences which make the persistence of "falsehoods" difficult to explain. Racial bigotry, irrational appeals to hate and prejudice, and attendant violence, continue to plague the world. He further argues that we can never empirically test the claim that truth generally triumphs over error, because this requires an objective measure of truth.⁸

Byrne, argues that certain groups have benefited from the weaknesses of the free market of ideas. These groups have harnessed and manipulated the tools of modern mass communication to perpetuate false doctrines.⁹ In summation these arguments hold the marketplace of ideas a false or poor metaphorical allegory for academic freedom. For one, it reinforces the notion that the university and its activities should conform to and be judged according to market criteria. No doubt such notions encourage extraneous attempts to corrupt the spirit of academic freedom.¹⁰

⁶ Peter Hogg, *Constitutional Law of Canada*, p 713 (1985).

⁷ John M Scanlan "Aliens in the Marketplace of Ideas: The Government, The Academy and the McCarran-Walter Act," (1988) 66 *Texas Law Review* p 1524 .

⁸ Rodney Smolla, "Academic Freedom, Hate Speech and the Idea of a University," 53 *Communications of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication*, (1971) 41 *George Washington Law Review* pp 90-191.

⁹ Peter Byrne, "Academic Freedom: A "Special Concern of the First Amendment," (1989) 99 *Yale Law Journal* 251, at p 261.

¹⁰ Antony O'Hear, "Academic Freedom and the University," in *Academic Freedom And Responsibility*, p 16 (Malcolm Tight, ed., 1988). In the United Kingdom attempts to run universities on a commercial level proved unworkable. Universities had been required to bid for money from the government in relation to the teaching of a predetermined number of students in a specified field. The idea was that universities would outbid each other and lower costs of education per student because of economies of scale. See "Universities For Sale?," and "University Funding Plan Collapses in Chaos," in 1990 *Nature* pp 3-4.

For several reasons these arguments are misplaced, at least in so far as they relate to the university. At a theoretical level, the inadequate comprehension of the workings of the market place of ideas, stems from the failure to distinguish concept from conception.¹¹ As an ideal, the concept of a free market of ideas is not based on empirical observation like trade in goods. It is a construct of reason that accords with the idea of the university. Accordingly, it should not be confused with the ordinary market. The latter has its logic in profit, while the former is tied to the notion of truth. At the perceptive level, one can, for example, make a fundamental distinction between wheat trading in the market and a polemic between professors about what constitutes wrongful gain in wheat trading. There is thus a categorical distinction between commodities trading and the free exchange of ideas. The scepticism of the market place of ideas is healthy in that ideas are subjected to scrutiny and rigorous debate before gaining acceptance. The claim is that truth stands a better chance not only by the competition but also by allowing it to resolve itself organically, i.e. without external intervention.

This, in essence underlies Mill's claim that truth, unlike error, never dies and that freedom is the condition precedent to all inquiry. Without competition in ideas, truth would degenerate into dogma.¹³ The dialectic of truth and refutation arises because of the uncertainty and fallibility of the human mind, i.e. most beliefs cannot be said to be true or false. The underlying rationale of Mill's argument is that an opinion that has been silenced might have very well been true; and even if the opinion was erroneous, it may have contained some valuable elements of truth. The truth of statements must be tested by vigorous debate otherwise their validity of statements is at risk of being perceived as prejudice. Our tolerance of the existence of bigoted falsity and evil may be necessary for us to understand the good. In the long run censorship is futile because of human nature itself. Truth, even when suppressed, never dies, for new generations will always discover it.¹⁴

Schauer, argues that this aspect of Mill's argument is weak when applied to society in general. Society has at times been seduced by appeals to irrational prejudices. There have been circumstances when opinions have been suppressed, precisely because they are true or thought to cause undesirable consequences unrelated to

¹¹ The distinction between concept and conceptions forms part of the Rawlsian enterprise. A concept is ahistorical, while conceptions are influenced by factors like history, politics, economics, sociology and one's contingent circumstances. See John Rawls, *A Theory of Justice*, pp 5-6; Ronald Dworkin, *Taking Rights Seriously*, pp 134-136 (1977). We deal with academic freedom the same way. The purpose of theory is to discover the concept and justify it. While the concept of academic freedom exists outside of history, a historical exposition can demonstrate the extent to which the ideal has been observed under different political circumstances.

¹² Mill, *On Liberty*, pp 97-99; *Keyishian v Board of Regents* 385 U.S. 589, 603 (1967).

¹³ Mill, *On Liberty*, pp 115-116.

¹⁴ Consider, for example, the existence of racist groups in society. The argument is not that we should always maintain an adequate supply of racists in society. Rather what matters is our willingness to tolerate them and to try and understand racism and its attendant evils. To suppress them would drive them underground which is ultimately more dangerous. It is not the good that matters, rather it is the evil that is avoided.

the truth or falsity of the suppressed opinions. Schauer concludes, and correctly so, that the argument for the power of truth is best suited to institutions dedicated to the very purpose of rational thinking and the pursuit of truth as an end in itself.¹⁵

The Pursuit of Truth

The pursuit of truth is an end in itself, and as a pre-eminent value it is above all other interests in the university. The end we are concerned with is not sensual satisfaction but rather the Aristotelean formulation of knowledge as the maximal development of the intellect, i.e. the "potential that distinguishes man *qua* man from all other creatures."¹⁶ In *On Liberty*, Mill ponders on the question why the majority of humankind, (given the right circumstances) is amenable to rational opinions and conduct. The answer lies in the quality of the human mind, which makes a person as a moral or intellectual being, capable of recognising that errors are correctable by discussion and experience.¹⁷ Marcuse like Mill believes that the *telos* (end) of tolerance is truth. Tolerance of free speech is the way of improvement, of progress in liberation, ... because there is an objective truth which can be discovered, ascertained only in learning and comprehending that which is and that which can be and ought to be done for the sake of improving the lot of mankind.¹⁸ The quest for truth in universities has rendered incalculable benefit to society, but the magnitude of this service is rarely sufficiently appreciated by society in general.¹⁹

Utilitarian and Political Justifications of the University

It is a truism that politics, politicians and society in general are loathe to accept anything that cannot be justified in utilitarian terms. The public good justification of the university would appear to be that the university and academic freedom are essential to the legitimacy of the political process and to answer the needs of society.²⁰ In one of the greatest tracts on political democracy,²¹ Hobbes offers a spirited political justification of the university. For him universities are;

The Fountains of Civill and Morall Doctrine, From whence The Preachers and Gentry, drawing such water as they may find, use to sprinkle the same.. upon the People, there ought certainly to be the greatest care taken, to have it pure, both from the Vermin Of Heathen Politicians, and from the Incarnations of Deceiving Spirits. And by that means the most men, knowing their Duties will be less subject to serving the Ambitions of a few Discontented persons ...

For Hobbes the university is the only agency capable of channelling political ideas to society in a rational manner. Only in the university, where political sanity prevails, is his book safe from the prejudices of politics and religious demagoguery.

¹⁵ Frederick Schauer, *Free Speech: A Philosophical Inquiry*, pp 15-39 (1982).

¹⁶ Id at p 49.

¹⁷ See John Scanlan, "Aliens in the Marketplace of Ideas," p1532. Quoted by

¹⁸ Scanlan, Id at pp 1532-1533. The Marcusean argument answers in part Marxist arguments that academic freedom is an ideology. I consider these Marxist arguments below.

¹⁹ Robert MacIver, *Academic Freedom in Our Time*, p 11 (1955).

²⁰ See *Sweezy v New Hampshire*, 354 U.S. 234, at pp 249-262 (1957); *Keyishian v Board of Regents*, 385 U.S. 589, at p 603 (1967); *Group Universities Case* [1973] 35 BVerfGE 79 in Kommers, *Constitutional Jurisprudence*, 437, at p 442.

²¹ Thomas Hobbes, *Leviathan*, p 491 (Richard Tuck, ed., 1991).

The university is a profoundly social institution and not a brooding omnipresence in the sky. University curricula are largely governed by material considerations constitutive of society's needs. The university is composed of faculties of medicine, the physical and natural sciences, law etc. These utilitarian needs may change from time to time and are contingent on empirical circumstances.²² Nevertheless, the teaching of the curricula, research or study must be guided by public reason.²³ The public service aspect of the university does not mean society must have a say in how faculties should go about their tasks. Universities not only instil a capacity for rational and independent judgement.²⁴ They also educate and enable the individual to participate in the cultural, civil, political and economic affairs of her society. This promotes autonomy by fostering self respect.²⁵

While one can analyse the benefits of academic freedom in the university from a utilitarian perspective, it is difficult to justify the right itself in the same terms. In the utilitarian view, "a right has reality, only when it is expressly asserted by authority of the state", or when "whether through the agency of the state or when (whether through the agency of the state or some other coherent group) it has positive force- or in the final resort, physical force to assert its claim."²⁶ Moreover, if academic freedom is solely justified on grounds of efficiency or the greatest happiness as the ultimate ends, this does not explain why its exercise can lead to great unhappiness.²⁷ Academic freedom cannot be granted and taken away depending on whether it serves some interest at any particular moment. The *raison de ^etre* of the right to academic freedom is freedom in scholarship and not welfare.

A utilitarian justification of academic freedom easily provides ammunition to opponents of academic freedom. A powerful argument against academic freedom is that advanced by Marxists. They argue that in essence academic freedom and the university are in the service of capital. These are serious objections that warrant a detailed elaboration and response.

²² We can concretise the idea by pointing to legal studies. Witness the decline in the popularity of legal formalism and positivism in American law, schools and the ascendancy of law economics and critical legal studies. Within the law schools there is always a healthy conflict between those who claim to train lawyers and those who claim to studying or teaching law.

²³ On the social nature of university studies see, e.g. Immanuel Kant, *The Conflict of the Faculties*, (Mary J Greggor, trans., 1992).

²⁴ Peter Byrne "Academic Freedom: A Special Concern," pp 335-335.

²⁵ See Rawls, *A Theory of Justice*, p 101.

²⁶ Russell Kirk, *Academic Freedom: An Essay in Definition*, pp 3-4 (1977).

²⁷ Hardy E. Jones, "Academic Freedom as a Moral Right," in *The Concept of Academic Freedom*, p 45 (Edmund Pincoffs, ed., 1975). This should not be taken as a denigration of utilitarianism as an analytical tool. The argument is that academic freedom is not based on welfare or social utility, but its fruits can be analyzed from a utilitarian perspective. I have adopted this argument to answer, in part, the claims of African leaders who claim we do not need academic freedom for reasons of economic efficiency. However, the benefits outlined above would appear to far outweigh any justifications for interfering in the universities in the name of the public good.

Marxist Objections To Academic Freedom

A thesis propounded by Bertell Ollman is that, academic freedom, serves capitalism, and that this is masked by tenuring some radical faculty. Without such faculty, what emerges from the universities would be seen as propaganda and not knowledge or science. Within the capitalist class itself, there is a conflict as to who decides on the content of curricula, and, as to who will be tenured; the government, the administration or faculty or capitalists in society. Academic freedom thus entails academic repression! As long as the capitalists control society and consequently the university, there will always remain a gap between its practice and ideal.²⁸

Marx argued that the ruling ideas in every epoch are those of the materially dominant class.²⁹ Gramsci develops a two pronged argument that expands on Marx's insight. In *State and Civil Society*,³⁰ he argues that the function of the capitalist state is to raise the great mass of the population to a particular cultural and moral level that corresponds to the needs of the productive forces and thence the interests of the ruling class. The state thus uses schools and universities to perform a positive educative function and the courts to perform the repressive and negative function. The capitalist class ideologically presents itself as capable of absorbing the entire society, culturally and economically, with the state taking the role of educator. Ideological hegemony, through the concept of separation of powers, is the tool for political control, while the repressive character of the state only emerges in times of crisis.³¹ Thus in the context of western democracies, the ideology of rights falsely presents the ruling class as the guardian of the interests and sentiments of the ruled.³² The role of intellectuals is to ideologically prop the ruling class by giving it "homogeneity and consciousness" in the socio-economic and political spheres.³³

Poulantzas, views intellectuals as state functionaries, who are enmeshed in power relations and who reproduce the capitalist system by maintaining the distinction between manual and intellectual labour.³⁴ An even more virulent attack comes from Milton Risk. He argues that academic freedom is an ideology designed to preserve capitalism in its destructive form, i.e. as imperialism.³⁵

Marx, wanted to alleviate socio-economic inequality and its negative impact on equal access to mental and intellectual development. This is commendable and admirable. This concern can be easily resolved by free and equal access to education, which the state is required to secure. Consider here the universal nature of education and how societies the world over pursue it in some way or another.

²⁸ Bertell Ollman, "Academic Freedom in America Today: A Marxist View," (1983-1984) 35 *Monthly Review* pp 30-41.

²⁹ Karl Marx, Frederick Engels, *The German Ideology*, p 64 (1970).

³⁰ Excerpts in *The Political Economy of Law: A Third World Reader*, 201 (Yash Ghai *et al* eds., 1987).

³¹ *Id* at p 200.

³² Peter Beirne, Richard Quiney, eds., *Marxism and Law*, p 279 (1982).

³³ Antonio Gramsci, *The Modern Prince and Other Writings*, 118 (1957).

³⁴ Nicos Poulantzas, *Political Power and Social Classes*, (Timothy O'Hagan trans., 1976).

³⁵ Milton Risk, "Academic Freedom in Class Society," in *The Concept of Academic Freedom*, p 7 (Edmund R. Pincoffs, ed., 1975).

The university should not be seen a microcosm of the political or economic system, otherwise the whole issue of academic freedom collapses and the whole learning process would be nothing but ideology.³⁶ For Marx, ideology denoted the false consciousness which the ruling classes impart to the masses to perpetuate and mask their oppression.³⁷ There is, therefore, a contradiction in Marx. Once that false consciousness is unmasked, then what remains must be objective reality. This still leaves open the possibility of the pursuit of objective truth. Otherwise there would be no legitimate reasons for distinguishing academics from government bureaucrats, or even Marx from the members of ruling class for that matter.

This, should not be construed to mean truth is pursued in a vacuum. The pursuit is not abstracted from social reality. The questions a researcher or a professor deliberates on, and the methodology used, can be determined by one's social background.³⁸ Nevertheless one has to be free in order to be objective. Science, for example, is not simply a matter of laboratories and experimentation with apparatuses and hypotheses that support and explain the results. Rather it is process of knowledge and as such, it presupposes independence from outside control.³⁹ Knowledge is not mere interest in a particular outcome, but rather objective and independent analysis in reaching the outcome. There is nothing wrong, for example, in requiring knowledge on religion, capitalism, Kant, Marx etc. But, it would be difficult to defend a system that requires a belief in any branch of knowledge as a condition to passing an examination or the award of a degree.

No doubt academic freedom does serve the good, but its binding nature as a right is not dependent upon the good. While research and scholarship can benefit welfare or certain elites in society, utilitarian gains are incidental to the nature and purpose of academic freedom. Our primary concern is the pursuit of truth as an end in itself and the *modus operandi* of arriving at that particular result. Universities are not simply the stooges of power, even though power always attempts to use them for its own ends.⁴⁰

³⁶ Moreover one has to be wary of nihilism; a right encapsulated in bourgeois ideology is certainly better than no right at all.

³⁷ Marx and Engels, *The German Ideology*.

³⁸ Allen Fenichel, David Mandel, *The Academic Corporation, Justice Freedom and the University*, p 150 (1987).

³⁹ See, John Ziman *et al*, *The World of Science and the Rule of Law*, p 13 (1986); "Factors and Conditions Conducive to Academic Freedom," in *Report of the Paris WUS/ UNESCO Seminar*, 1 (1989).

⁴⁰ For example in 1914 Harvard University rejected a \$10 million bequest that was conditional upon the dismissal of one radical professor. Another good example is that of a professor of Economics, Politics and History at Wisconsin University who was tried by a committee of the Regents for believing in "strikes and boycotts, justifying and encouraging the one while practising the other," and for promoting attacks on private property. Academics feared the worst, since the committee was composed of conservative lawyers and business people. To their surprise the board exonerated the professor and issued an authoritative statement that; "We cannot believe for a moment that knowledge has reached its final goal, or that the present society is perfect. We must therefore welcome from our teachers such discussions as shall suggest the means and prepare the way by which knowledge may be expanded, present evils be removed and others prevented. In all lines of academic investigation it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead." The two examples are reported by Walter P. Metzger, *Academic Freedom in the Age of the University*, 153, at p 184 (1955).

The Idea of Academic Freedom

The concept of academic freedom is derived from what Kant calls public reason or intellectual freedom,⁴¹ an idea to which we now turn. As free and purposive persons we are all committed to thinking and acting in accordance with thought. Reason has no dictatorial authority, its resolution is simply an agreement of free beings.⁴² In his essay, "What is Enlightenment?," Kant contrasts between those who are unenlightened and acquiesce to others' opinion and authority without question and those who are enlightened and speak publicly in their voice. This leads to the distinction between public and private reason.

When one uses public reason, he/she addresses the entire public, even though it may end up only reaching "men of scholarship." What amounts to the use of public reason is not determined by the number of the audience. Rather, it is in terms of the audience whom it is intended to reach. In contrast, private is what an agent may make use of while in a relationship of command and obedience or while in the pursuit of self interest. For example public servants or soldiers or an employee cannot exercise public reason because they are bound to obedience and the commands of superiors.⁴³

The distinction between public and private reason can be exemplified as follows. A priest cannot criticise God at the pulpit, because as a servant he is bound to obedience, but when writing as an individual he can doubt the existence of God. In the first instance, he is acting on a commission from outside, and, in the second instance, he is writing of his own accord.⁴⁴ Discussion which is not conditional on external coercion, even though it reaches only a small audience, constitutes public reason. What characterises public reason as intelligence without appetite is detachment and its accessibility to the world at large. Even if few people understand the

⁴¹ The idea of public reason is introduced by Kant in an essay entitled, "An Answer to the Question: "What is Enlightenment," in *Kant's Political Writings*, p 85 (Hans Reiss, ed. 1970). Reason when combined with the will denotes "the psychological faculties by which we pursue knowledge on one hand, and give consent on the other." See Paul W. Kahn, "Community and Contemporary Constitutional Law Theory," (1989) 99 *Yale Law Journal* p 1.

⁴² Onora O'Neill, "Vindicating Reason," in *The Cambridge Companion to Kant*, pp 291-293 (Paul Guyer ed., 1992).

⁴³ See *Id* at p 298. This provides a clue as to why tenure and university autonomy are central to the idea of academic freedom and the university. A political conception of public reason is that detailed in John Rawls, *Political Liberalism*, pp 213-254 (1993). Because Rawls's discussion is political, he does not recognize the distinction between public and private reason. Rather he distinguishes, public and "nonpublic" reason. The former accounts for political democracy, while the latter explains the existence of universities or churches etc. The nonpublic reasons of each non-political institution differ depending on the nature and aim of the institution in question and conditions under which it pursues its ends. (*Id* at pp 220-221). Rawls does not however dwell on the issue of whether the individuals in such an institution require public reason in carrying out their tasks.

⁴⁴ The example of the priest is suggested by Kant in "What is Enlightenment," pp 56-59. See also Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy*, p 32 (1989).

discussion in question, the important thing is that the issues can be debated without invoking the force of authority. Here authority refers to anything aside from reason itself, that tends to adversely influence the nature of the debate. Thus, communications between scholars "who are committed to reasoned inquiry is public."⁴⁵

People must be free to exercise their public reason because "freedom of the pen is the only safeguard for the rights of the people."⁴⁶ This is not a shallow defence of freedom of opinion, but is an idea that finds vindication in the application of public reason. It is the key to human liberation; without intellectual freedom, people are bound to obeying unjust despotism. The maximal use of intellectual freedom requires general political freedom. For example, under a theocratic state, the uses of reason are not wholly public; they only become public when alien authority is replaced by tolerance. At a political level, the failure to tolerate the use of public reason marks a movement towards unjust polity, i.e. dictatorship. Where intolerance is practised, those whose thinking is silenced are not suppressed by reason, "but by authorities who lack reasoned vindication."⁴⁷ In contrast, in a state guided by the rule of law, where legality yields the greatest possible freedom realisable, the use of reason is wholly public.

Public reason, being a reflex of human agency, is not an abstract principle. Rather, it is a guiding principle of "thinking and doing in a dynamic process, that neither submits to outside control, nor fails to recognise differences in opinion and practice."⁴⁸ Because human dignity and progress is dependent on intellectual freedom, a contract limiting the use of one's public reason is void *ab initio*.⁴⁹ Autonomy in thinking is the core of public reason and enlightenment. Autonomy involves not only self-assertion or independence, but thinking and acting freely and not blindly obeying authority.⁵⁰ This presupposes tolerance.

Toleration is grounded in the idea of reason and conversely reason finds vindication in tolerance.⁵¹ Tolerance does not mean mere passive non-interference, but rather involves a response to a communication, i.e. it must point to a universal debate.⁵² Nor is it simply a political virtue, or a practice of just polity. It is the only matrix within which a plurality of potentially reasoning beings can constitute the full authority of reason and so be able to debate without internal restrictions as to what a just political constitution ought to be.⁵³

⁴⁵ O'Neill, *Constructions of Reason*, p 34.

⁴⁶ Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, But it Does not Apply in Practice,'" in *Kant's Political Writings*, 85.

⁴⁷ O'Neill, *Constructions of Reason*, 39, at pp 48-50.

⁴⁸ *Id* at p 301.

⁴⁹ Kant, "What is Enlightenment," p 57.

⁵⁰ O'Neill, "Vindicating Reason," p 299.

⁵¹ This theme runs through most of Kant's major writings. See the works cited in Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy*, pp 28-29 (1989).

⁵² *Id* at pp 31-32.

⁵³ *Ibid.* p 50.

Since public reason has no exogenous end except to be true to itself, it must involve and draw strength from reflection, debate, criticism and self criticism.⁵⁴ According to Kant, the plurality of ideas creates the greatest possible unity. The diversity lies in the differences in opinion, while the unity lies in the search for a solution.⁵⁵ So seen, public reason is preconceived in reason and articulated through reason.

Reason in general, and public reason in particular, precede politically instituted forms of tolerance; the former guides the latter. While Kant maintains a distinction between civil liberties and intellectual freedom,⁵⁶ he recognises that "the use of public reason involves some outward action, and so needs some civil freedom." The recognition is that intellectual freedom does not and is not limited to solitary reflection. One who reasons must address the entire reading public.⁵⁷ This explains the symbiotic relationship between academic freedom and free speech. A society that is tolerant of free speech has high regard for public reason. It follows that intellectual freedom should ideally be conceived in a politically tolerant society, for obedience without freedom is the cause of secret societies and conspiracy.⁵⁸

The Idea of the University as an Exemplar of Public Reason

The epistemological foundation of the university lies in the conceptual structure of public reason itself. Possibility leads to actuality. The possibility of academic freedom (at the abstract level), exists everywhere but its practice depends on contingent empirical circumstances. Thought, cannot remain internal, it must practically verify itself, i.e. thought must achieve a determinate end. In the university, purposive activity is linked to an end through thought; public reason and practical activity are

⁵⁴ In several statements in his works, Kant argues that; "Reason must in all its undertakings subject itself to criticism; should it limit criticism by any prohibitions, it must harm itself, drawing upon itself damaging suspicion. Freedom in thinking means the subjection of reason under no other laws than that which it gives itself. Reason depends on this freedom for its very existence. For reason has no dictatorial authority; it is always simply the agreement of free citizens, of each one must be permitted to express, without let or hinderance, his objections or even his veto." Quoted from O'Neill, *Constructions of Reason*, p 37.

⁵⁵ O'Neill, "Vindicating Reason," pp 286-287.

⁵⁶ The political distinction is that maintained by Mill, a distinction which is an integral part of *On Liberty*. Academic freedom as of necessity precedes the political and legal recognition of free speech or any political or civil rights for that matter. These rights must exist as constructs of thought before they become a construct of politics. These rights require justification and they cannot be so justified without intellectual freedom.

⁵⁷ O'Neill, *Constructions of Reason*, pp 32-33.

⁵⁸ Kant, "On the Common Saying," p 85. Mill makes the same observation; "A state of things in which a large portion of the most active and inquiring intellects find it advisable to keep the general principles and grounds of their convictions within their breasts, in what they address the public, to fit as much as they can of their own conclusions to premises which they have internally renounced, cannot send forth the open, fearless characters and logical consistent intellects..." See *On Liberty*, 94.

intrinsically conjoined.⁵⁹ All reason is purposive and thus pure thought must be translated into objective reality. Institutionally, this transformation may manifest itself in verbal discourse or constructions of mathematical models and so on. Members of society are largely preoccupied with thought that cannot be generalised. They are concerned with private reason and causally, they are guided by utility, i.e. self interest. Thus, public reason requires an institution where the life of the mind can be actualised.

By way of example, a priest can write a scholarly article doubting the existence of God but the nature of his job binds him to considerations of utility. Writing on atheism can result in undesirable personal and societal consequences leading to bias. It is best that this be discussed in an institution that is distanced from society. Consider and reflect on the case of pornography. A reasonable person construed as a purposive agent would want its restriction because it might, *inter alia*, promote undesirable passions. At the same time, he would accept that its study so that society can understand human desires, morals and the like.

The idea of the university brings potentially reasoning beings together to publicly discuss and pursue matters concerning humankind. In a democracy, the function of the university becomes truly public. It stands between the citizenry, which is largely concerned with private interest and the state. The preoccupation with self interest can lead to acquiescence with unjust polity. It therefore stands on the university to scrutinise political activity and the activities of the citizenry from the point of reason. Socialists, liberals, anarchists, nihilists and the like, fight it out from the point of reasoned argument. In the Hobbesian formulation, the university must stand above partisan views of what is good or right.⁶⁰

Since the general public is largely preoccupied with private gain, it conceptually delegates its public reason to those in the university. Meiklejohn succinctly captures this idea when he remarks;

We who engage in research and teaching do so as agents of the people ...[W]e are commissioned to carry on for the people forms of intellectual activity, which belong to them, are done in their interest, but which in some specific forms, they cannot carry for themselves. Just as some men make shoes and other men grow food, so it is our business to discover truth in its more intellectualised forms and to make it powerful in the life of the community. And since we act as agents of the people, they grant us such of their freedom as is needed for that field of work.⁶¹

Those in the university argue on these matters from the point of rationality, i.e. they reason. This is what politically vindicates the participation of intellectuals in public affairs. Understood this way, the university is not a conglomeration of physical structures. An assembly of scholars who periodically meet to publicly and freely articulate matters of intellectual interest is still constitutive of a university. Centrifugally, this explains the nature of the university. If it is to exercise reason, it must be

⁵⁹ See e.g. Ernest J Weinrib, "Law as a Kantian Idea of Reason," 87 *Columbia Law Review* 472, at p 482 (1987) (discussing purposive activity as an aspect of practical reason.)

⁶⁰ Hobbes, *Leviathan*, p 491.

⁶¹ See e.g. Alexander Meiklejohn; *Political Freedom*, p 126.

free of relations of command and obedience. Institutionally, public reason is reflected in the precepts of university autonomy, free expression and tenure to ensure that reason remains true to itself. These coefficients are unitary, i.e. they are constitutive of an integrated whole.

This whole, ensures that those want to exercise their reason publicly can criticise unjust laws and social practices and engage in what ever studies they consider worth studying, without being seen as treasonous or suffering reprisals. This conception does not deny public involvement in the affairs of the university. Rather, while the university presents itself as the model for society, it diametrically resists politicisation by society, even if what goes on in the university may be political. Politicians, church authorities, or philanthropists cannot competently judge whether theories advanced by scholars are heresies or pernicious facts.⁶² Only scholars committed to rational inquiry are capable of passing such a judgement, because all other groups are largely influenced by considerations of utility.

The choice of subject, mode of analysis, publication of results whether written or oral all belong to the domain of academic freedom.⁶³ The right assures scholars that their reasoned conclusions, even those in disagreement with society at large or their colleagues, will not be ground for reprisals from any quarter.⁶⁴ Hence academic freedom is not

... thought of as a privilege, not as a concession, nor something that any authority inside or outside the institution may grant or deny, qualify or regulate according to its interest or discretion. It is something that is inherently bound up with the performance of the university's task, something as necessary for the task as pen and paper, as classroom and students, as laboratories and libraries.⁶⁵

Public needs should not translate into interference in the affairs of universities, because in the university knowledge is pursued as its own end and not merely as a means to an end.⁶⁶

Academic Freedom Distinguished From Free Speech

The previous discussion pointed to two things; that academic freedom as public reason differs from free speech and that nevertheless it is largely expressed through

⁶² Crosby Warren, "Academic Freedom," in *The American Concept of Academic Freedom in Formation*, 691 (Walter P Metzger, ed., 1977).

⁶³ Raoul Wallenberg Institute of Human Rights and Humanitarian Law, "Academic Freedom, *Report on a Seminar on Academic Freedom*, p 9 (1992).

⁶⁴ "Academic Freedom at the University of Stockholm," 29 *Minerva* 330 (1991).

⁶⁵ MacIver, *Academic Freedom in Our Time*, p 11.

⁶⁶ See *Sweezy v New Hampshire* 354 U.S. 234, at p 255 (1957). The concurring judgement of Justice Frankfurter is instructive. "A university ceases to be its own nature if it becomes a tool of Church or State or any sectional interest. A university is characterised by the spirit of free inquiry, its idea being the ideal of Socrates- "to follow the argument where it leads..."

speech. The corruption of the term "academic freedom" to cover speech, especially political speech, has undesirable consequences. It implies universities are subject to the criteria of political parties, a view that is at odds with the idea of public reason.⁶⁷

Academic freedom's distinctiveness from free speech is conceptual and not physical but nevertheless this distinction has practical cogency. This conceptual distinction lies in the criterion for justification and purpose. Those who profess to be academics do not just talk, write or shout. They reason and justify and at least attempt to do so. Painting swastikas or shouting racial and sexist insults may well be free speech, but that has nothing to do with academic freedom. So conceived academic freedom is not an empirical licence for making baseless claims or writings; it entails reasoned argument. Academic discourse is highly disciplined and formalist. The speaker uses reasoning rather than demagoguery to persuade his critical audience. Any deviance from accepted norms must be explained and or justified.⁶⁸ Many types of expression are not allowed; "the physicist may not sing, the historian may not whine, the economist may not offer the primordial scream."⁶⁹ Sequentially and purposively, academic freedom is academic freedom and free speech is free speech.

The striking feature of academic freedom as an idea of public reason is its normativity. Academics everywhere are not only concerned with discourse or speech, but with reason. This explains why in the academic sphere, the world over, we have standards of correctness and criteria of justification. Reason acknowledges certain common elements; "the concept of judgement, principles of inference, and rules of evidence, and much else, otherwise they would not be ways of reasoning but perhaps

⁶⁷ Most Western liberal constitutions, for example the German and Japanese Constitutions (Articles 5(3) and 33 respectively.) recognize academic freedom as a right distinct from free speech. In the United States, judicial practice created a separate constitutional right of academic freedom as a subset of the First Amendment. *Sweezy v New Hampshire*; *Barrenblatt v United States* 360 U.S. 109 (1959); *Keyishian v Board of Regents*. In contrast the court differentiates higher and lower education. Where school teachers or students are involved, the court has dealt with the matter speech grounds without reference to academic freedom. For example in *Pickering v Board of Education*, 391 U.S. 563 (1968). The matter of a school teacher who was dismissed for criticising the administration was dealt with wholly in terms of his position as a government employee. Or *Tinker v Des Moines* 393 U.S. 503 (1969). The case of high school students who had worn armband to protest the Vietnam war was resolved on speech grounds. For a discussion of this distinction, see Thomas I. Emerson, *The System of Free Expression*, pp 593-626 (1970). The Japanese courts have adopted a similar approach. See Teruhisa Horio, *Educational Thought and Ideology in Japan*, 75-76 (1988).

⁶⁸ J Peter Byrne, "Academic Freedom: A 'Special Concern' of the First Amendment," (1989) 99 *Yale Law Journal* 254, pp 258-262.

⁶⁹ *Id* at p 258.

rhetoric or means of persuasion.”⁷⁰ *In pari ratione* academic freedom as public reason involves the willing of thought that is generalisable, while free speech involves the willing of thought that is private.

Relevance, as the criterion for justification, is an important signpost that marks academic discourse from other forms of expression. The very idea of academic discourse denies the relevance of race to a discussion on the quantum theory or the discussion of how nuclear particles react in an essay on principles of contract for example. With, say, a political science class, different considerations may apply. There are legitimate reasons for learning the nature of hate groups in the political process.

In short, reason sets its own limits. A history professor who writes a book arguing that the holocaust or slavery is a fiction is a valid ground for dismissing him for incompetence because all reasonable academics know this to be factually false. This is different from arguing that the holocaust or slavery were good. The later is a statement of opinion and not of fact. Conversely, an engineering professor can write a book doubting slavery or the holocaust.⁷¹ But he can't rely on academic freedom in doing so. Only free speech, so understood, allows him to do so. This does not mean an engineering professor is not protected by academic freedom when writing what reasonable historians accept as scholarly. An academic has no obligation to confine his analysis to a chosen field. The world would have suffered a great loss had Kant remained a physicist and had been forbidden to turn his attention to law and philosophy.⁷²

Some legal commentators having failed to grasp the normative foundation of academic freedom in public reason argue for its replacement by rights in the workplace.⁷³ While it is tempting to see academic freedom as an aspect of employment, academic freedom is not an incident of employment. Workers in a can factory are answerable to the owner and yet academics are answerable to themselves. Put differently, workers are in a relationship of command and obedience. Academics can still have workers' rights, but without academic freedom, a university ceases to of its own nature. A useful analogy is the judiciary. It would be the height of naivety to argue that judicial tenure is about workplace rights. While workers have free speech in the workplace, such speech certainly does not extend to public criticism of

⁷⁰ Rawls, *Political Liberalism*, p 220. Thus in *Kleindienst v Mandel*, 408 U.S. 753, at p 765 (1972), the Court rejected the state's argument that U.S. academics did not require the physical presence of a communist academic because his presence could be supplanted by modern telecommunications resources like telephone hook ups. It found that in academic debate, face to face argument was central, just as in the courts the submission of written briefs does not dispense with oral argument.

⁷¹ See eg David M. Rabban, "A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment," (1990) 53 *Law and Contemporary Problems* 227, at p 242 .

⁷² See e.g. Machlup, "Some Misconceptions," p 194.

⁷³ Robert F. Ladenson, "Is Academic Freedom Necessary?," (1985) 5 *Philosophy and Law* 59, at pp 77- 87 .

employers, customers, sponsors or patrons, nor do companies go out of their way to hire people who are critical of the principal shareholder.

Conclusion

The inexorable conclusion is that the idea of academic freedom is inherent in human reason. The concept of academic freedom is not peculiar to liberalism. Nor is it incompatible with socialist democracy, theocracy or any other mode of social governance. Can anyone point to a society that has laid down a dogma and found no one to challenge it? What differs is the conception and practice of the concept. This is largely dependent on the justness of the prevailing political order. The picture I have painted indicates that the liberal conception of academic freedom comes nearest to the realisation of the concept.

The university simply mirrors the application of public reason at the theoretical and practical level. Scholarship, so called is not about playing court to authority, or advancing certain interests, or friendship or placating foes. It should principally involve vindicating one's position from a reasoned argument. Philosophically, academic freedom is the sum total of conditions and precepts that make possible the practical realisation of public reason. Juridically, it involves drawing out the practical implications of public reason. To conclude, academic freedom is the legal right you and I have individually as student and teacher and collectively as an institution by the dictates of our calling. The right is anterior to its outcomes or to the state. It is owed to you and I by virtue of being persons engaged in the academic enterprise. From the point of utility, the guiding maxim is that if you want universities to serve the public good, make them repositories of public reason and then and thereby conjoin the freedom of scholars with the legitimate and rational needs of society.



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